SYED AHMAD AL-JUNIED & ORS. v. RESHTY

[P.C. (Lord Guest, Lord Upjohn & Lord Donovan) February 17, 1969]
[Privy Council Appeal No. 35 of 1966]

Landlord and Tenant — "Premises" — Meaning of — Statutory tenant — Definition of — Claim of mesne profits — Control of Rent Ordinance (Cap. 242), ss. 15 (1)(g), 27 and 28 — Differences between English Rent Act and the Control of Rent Ordinance.

Landlord and Tenant — Notice to quit — When tenant becomes trespasser.

This was an appeal and cross-appeal from the judgment of the Federal Court ([1966] 2 M.L.J. 121) reversing in part the judgment of Choor Singh J. ([1965] 1 M.L.J. 77) substantially in favour of the appellants (hereinafter referred to as the landlords) who had by a lease dated September 28, 1953 demised about 550 acres of land in the Paya Lebar district, Singapore together with all the buildings erected thereon to the respondent (hereinafter referred to as the tenant) for a term of 5 years from April 1, 1953 at a monthly rental of $1,300. The lease expired on March 31, 1958 and thereafter the tenant remained in possession as tenant from month to month at a monthly rental of $1,400 which was duly paid by the tenant. The landlords gave notice on February 23, 1961 to determine the monthly tenancy with effect from March 31, 1961.

There were about 2,100 sub-tenants on the land who had with the landlords' consent erected temporary buildings thereon at their own expense and the tenant was receiving at the date of the expiry of the tenancy a substantial profit therefrom amounting after payment of rent and the substantial expenses of collection and income tax to about $2,000 per month.

The fundamental question in this appeal was whether having regard to the provisions of the Control of Rent Ordinance the tenant was liable (on holding over after April 1, 1961) to account to the landlords for *mesne* profits as a trespasser or whether she was a statutory tenant as defined in the Ordinance and as such, she was only liable for rent until an order for possession was made against her. Upon the cross-appeal the question was whether the respondent had established a case for possession under the provisions of the said Ordinance.

Held, allowing the appeal: (1) the case was clearly within the terms of section 15(1)(g) of the Ordinance and the landlords had established a case for possession and therefore the cross-appeal failed;

(2) the differences between the English Rent Act and the Ordinance are many and conclusions depending on their similarities are unsafe. The words of section 27 of the Ordinance defining a statutory tenant, are clear and unambiguous and must be given effect to;

(3) the tenant on expiry of the notice to quit failed to qualify as a statutory tenant within the meaning of section 27 and became a trespasser with the consequence accepted or conceded in many cases in the Malay States and in Singapore that she became liable to pay *mesne* profits.

Cases referred to:—

(1) *Ida Fernandez* v. *Murugiah* [1950] M.L.J. 83.

(2) *K.S. Mohamed Ismail* v. *Choo Pin* [1954] M.L.J. 183.

(3) *Hooi Moon* v. *Suppiah Chettiar* [1954] M.L.J. 186.

(4) *M.K. Ramasamy Pillai* v. *Meyappa Chettiar & Anor.* [1955] M.L.J. 105.

(5) *Tan Khio Soei & Anor.* v. *Ban Hin Lee Bank Ltd.* [1964] M.L.J. 71.

PRIVY COUNCIL.

M.J. Anwyl-Davies, Q.C. (*Simon D. Brown* with him) for the appellants.

L.A. Blundell, Q.C. (*Joseph Dean* and *J. Grimberg* with him) for the respondent.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by —

Lord Upjohn: This is an appeal and cross-appeal from a judgment giver on 6th April 1966 by the Federal Court of Malaysia (Appellate Jurisdiction) reversing in part a judgment given on 7th November 1964 by Choor Singh J. sitting in the High Court of Singapore substantially in favour of the plaintiffs. The facts may be shortly stated. The appellants-plaintiffs in the action (who will be referred to as the landlords) had by a lease dated 28th September 1953 demised about 550 acres of land in the Paya Lebar district of Singapore together with all the buildings erected thereon to the respondent (who will be referred to as the tenant) for a term of five years from 1st April 1953 at the monthly rent of $1,300. The lease expired on 31st March 1958 and thereafter the tenant remained on in possession as tenant from month to month at the monthly rent of $1,400. These rents were duly paid by the tenant. The landlords on 23rd February 1961 gave notice to determine this monthly tenancy with effect from 31st March 1961.

There was a large number, about 2,100, of sub-tenants on the land who had, with the landlords' consent, erected temporary buildings thereon at their own expense; and the tenant was receiving at the date of expiry of the tenancy a substantial profit rental therefrom, amounting after payment of rent and the substantial expenses of collection and income tax (as their Lordships understand) to about $2,000 per month.

Accordingly, it is not in dispute that had the tenant remained on in possession she would at common law have been a trespasser; and have been bound to account for this monthly sum to the landlords by way of *mesne* profits as from the expiry of the notice to quit.

But there is in force in Singapore a very comprehensive Control of Rent Ordinance passed in July 1953 (replacing an earlier similar Ordinance of 1947) which admittedly applies to this demised land; and the fundamental question upon the landlords' appeal is whether having regard to the provisions of the Ordinance the tenant, holding over from 1st April 1961, is liable to account to the landlords for *mesne* profits as aforesaid as a trespasser (as was held by the learned trial judge) or whether (as held by the Federal Court) she was a statutory tenant as

defined in the Ordinance and as such only liable for rent until an order for possession was made against her.

Upon the cross-appeal the question is whether the landlords establish a case for possession under and in accordance with the provisions of the Ordinance.

Upon this point they succeeded in both courts below.

As the decision of the Federal Court depended to some extent upon their view that the Ordinance was strictly in line with and comparable to the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (the Rent Act 1920) of this country some general review of the Ordinance is necessary.

The scope of the Ordinance is far wider than the Rent Act 1920 for it applies to "premises" which by definition mean "any dwelling house, flat, factory, warehouse, office, counting house, shop, school and any other building whether of permanent or temporary construction . . . ." and cover the demised land. Then there is no limitation to the application of the Ordinance by reference to the amount of the annual value of the premises; and the machinery of administration is entirely different; the Ordinance and its predecessor created a Rent Conciliation Board whose duty is to fix rent. If not so fixed the "standard rent" was the rent of the premises on 1st August 1939.

It is provided (by section 3) that any rent paid in excess of the rent fixed by the board, or, if not so fixed, the standard rent, is unlawful and may be recovered by the tenant. It is common ground that the standard rent for the demised premises in this case was $750 per month.

Then Part III of the Ordinance deals with recovery of possession. Section 14 provides:—

"No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the cases set out in this Part of this Ordinance."

Then section 15(1) sets out a large number of cases in a series of paragraphs numbered (*a*) to (*l*) in which an order for possession might be made. The relevant paragraph here is paragraph (*g*) and read with section 15(1) is in these terms:—

15(1) In the case of all premises such an order or judgment as is referred to in section 14 of this Ordinance may be made in any of the following cases namely

(*g*) where the tenant having sublet the premises or part thereof receives in respect of such subletting, rents (excluding any municipal services paid by the tenant) for any sublet part of the premises in excess of the recoverable rent for that part, or rents which exceed in the aggregate one hundred and ten *per centum* of the recoverable rent paid by the tenant himself including the apportioned rental or value of any part of the premises retained by the tenant or not sublet by him;"

Not all of these paragraphs are in such categorical terms, for a number of them leave it to the discretion of the court whether an order for possession should or should not be made. See for example paragraphs (*b*), (*j*) and (*l*). Under other paragraphs, in order to grant an order for possession the court has to form some opinion, see paragraph (*e*); while under others the facts entitling the landlord to possession may be wholly outside any knowledge of the tenant — see paragraphs (*i*), (*j*) and (*k*).

Part IV of the Ordinance is headed "Statutory Tenants" and its two constituent sections define statutory tenants and the terms of a statutory tenancy. This has no counterpart in the Rent Act 1920. Section 27 is the crucial section on the appeal, but it will be convenient to set out the whole of Part IV.

"27. The following persons are statutory tenants under this Ordinance, namely:—

(a) any tenant of premises who remains in possession thereof after the determination by any means of his tenancy and who cannot by reason of the provisions of this Ordinance be deprived of such possession by his landlord; and

(b) any sub-tenant becoming a statutory tenant under and by virtue of any of the provisions of this Ordinance.

28. A statutory tenant shall hold the premises of the landlord upon the following terms and conditions, namely:—

(a) he shall be deemed to hold as tenant from month to month, and subject thereto, shall observe and be entitled to the benefit of all the terms and conditions of his original tenancy or sub-tenancy as the case may be, so far as the same are consistent with the provisions of this Ordinance and with a holding from month to month:

Provided that in the case of a sub-tenant becoming a statutory tenant such a statutory tenant shall in addition hold the premises subject to any subsisting restrictive covenants contained in the terms and conditions of the tenancy between the landlord and the tenant;

(b) his tenancy shall be subject to be determined by such notice as would have been required by law to determine a monthly tenancy of the premises containing no express provision for determination; and

(c) he shall be subject to all the rights and powers conferred on a landlord under and by virtue of the Distress Ordinance."

By their claim the landlords contended that they were entitled to possession upon the ground that on the facts the case came clearly within section 15(1)(*g*).

By her defence the tenant denied that the sub-paragraph applied on various grounds now abandoned except as mentioned below. She counterclaimed under section 3 for repayment of rent paid by her beyond the standard rent which she duly recovered subject to the operation of the Statute of Limitations. The landlords have not appealed from that order.

Before their Lordships' Board the tenant put forward an argument (not advanced before

the trial judge) that paragraph (*g*) only applied where the tenant was paying the standard rent or rent fixed by the Conciliation Board; and if landlords unlawfully demand and receive a larger rent then they cannot rely upon the section. This argument did not impress the Federal Court nor does it impress their Lordships. A contention founded on "clean hands" was quickly abandoned and the argument was based on the view that paragraph (*g*) was not appropriately phrased to cover the case where rent which exceeds the recoverable rent is being paid. But their Lordships are of opinion that the language of the paragraph is too clear for argument. It applies whenever the rents received by the tenant exceed 110 per cent of the recoverable rent, as was the case here before, at, and after the notice to quit had expired. The rent payable by the tenant, if it exceeds the recoverable rent may, and in this case was, recovered from the landlords. The point therefore seems to possess little relevance. Whether in some special case the court might exercise its discretion under section 18 is not a matter which their Lordships have considered; it has not been and could not be invoked in this case. It seems to them that the case is clearly within the terms of paragraph (*g*) of section 15 (1) : and accordingly they agree with both courts below that the landlords establish a case for possession, and that the cross-appeal fails.

Accordingly it becomes necessary to consider the main question in the appeal, whether the tenant must account for *mesne* profits since 1st April 1961 or is a statutory tenant, liable only for the recoverable rent for the period during which she holds over.

In their Lordships' judgment this must depend upon the concluding words of section 27 (*a*) namely "who cannot by reason of the provisions of this Ordinance be deprived of such possession by his landlord". Purely as a matter of language it seems to their Lordships quite clear that the tenant does not satisfy this condition, because at the moment of the expiry of the notice to quit, the landlords were entitled to deprive her of possession by reason of the provisions of the Ordinance namely section 15(1) (*g*). It was said that the landlord could not "deprive" the tenant of possession, but only the court could do so, *i.e.*, by making an order for ejectment, and that in the meantime the tenant was a statutory tenant. This seems to their Lordships a most strained and unnatural construction which would in effect make the concluding words of section 27(*a*) virtually meaningless.

Their Lordships' view is supported by authority in Malaya on comparable Ordinances and in Singapore. See *Ida Fernandez* v. *Murugiah* [1] *per* Murray-Aynsley C.J. on the corresponding wording of the Ordinance of 1947 and *K.S. Mohamed Ismail* v. *Choo Pin* [2] *per* Briggs J. on the corresponding wording of section 15 of the Malayan Ordinance.

In their Lordships' opinion the learned trial judge rightly followed and applied these authorities as Spencer Wilkinson J. had done in *Hooi Moon* v. *Suppiah Chettiar* [3] again on the Malayan Ordinance.

To the same effect was the very clear statement of the position by Thomson J. (as he then was) in *M.K. Ramasamy Pillai* v. *Meyappa Chettiar & Anor.*[4] where he said (on page 106) :—

> "Section 15 of the [Malayan] Ordinance states what persons are statutory tenants under the Ordinance and apart from certain classes of sub-tenants which do not call for consideration in the present case a statutory tenant is:—
>
> 'Any tenant of premises who remains in possession thereof after the determination by any means of his tenancy and who cannot by reason of the provisions of this Ordinance be deprived of such possession by his landlord.'
>
> In other words (again apart from the question of sub-tenancy) before a person can claim to be a statu ory tenant of premises four conditions must be fulfilled:
>
> (a) he must have been a tenant of the premises;
>
> (b) his tenancy must have been determined, not assigned or anything of the sort;
>
> (c) he must have remained in possession of the premises after the determination of his tenancy; and
>
> (d) the provisions of the Ordinance must prevent him being deprived of possession by the landlord of the premises."

When Lord President he followed this clear exposition in *Tan Khio Soei & Anor.* v. *Ban Hin Lee Bank Ltd.*[5] in respect of the Singapore Ordinance itself.

Unfortunately in the earlier of these two cases the Lord President in a passage in his judgment, fully quoted in the present case in the judgment of the Chief Justice in the Federal Court, equated section 15 of the Rent Act with section 15 of the Malayan Ordinance, and drew the conclusion that notwithstanding the absence of any statutory definition of statutory tenant in the Rent Act, yet there was no material difference between a tenant who holds over under that Act (who admittedly remains in possession under a status of irremovability on paying the standard rent until ejected by judgment) and one who holds over under the Ordinance. The Federal Court followed and approved this statement of the law. Their Lordships are unable to agree; they have already drawn attention to the many differences between the Rent Act and the Ordinance and conclusions depending on their similarities are unsafe. The words of section 27 of the Ordinance defining a statutory tenant, as their Lordships have already held, are clear and unambiguous; there is no corresponding definition in the Rent Act, the term "statutory tenant" emanating entirely from judges. The wording of section 27 must prevail, and their Lordships

with all respect to the Federal Court, can see no ambiguity for any relevant purposes in that section.

The Federal Court also dwelt on possible hardship to the tenant, and the power of the landlord to harass him if the appellants' argument were right. No doubt there are some cases in section 15, as their Lordships have already pointed out, where the facts giving rise to a successful claim for possession by the landlord, may be outside the knowledge of the tenant or where the granting of possession will depend upon the discretion of the court; but this in their Lordships' opinion can afford no ground for not giving to section 27 its clear meaning.

Accordingly in their Lordships' opinion the tenant on expiry of the notice to quit failed to qualify as a statutory tenant within the meaning of section 27; and became a trespasser, with the consequence accepted or conceded in many cases in the Malay States and in Singapore that she became liable to pay *mesne* profits.

Their Lordships therefore allow the appeal of the landlords and restore the judgment of Choor Singh J. The matter must be remitted to the High Court to determine the question (reserved by that court) of the tenant's claim to deduct income tax in assessing *mesne* profits.

The tenant's cross-appeal will be dismissed.

The tenant must pay the costs of this appeal and cross-appeal before their Lordships' Board and of the proceedings in the Federal Court.

Appeal allowed;

Cross-appeal dismissed.

Solicitors: *Speechly, Mumford & Soames; Linklaters & Paines.*

GUAN BEE & CO. v. PALEMBANG SHIPPING CO. LTD.

[O.C.J. (Buttrose J.) December 10, 1964]
[Singapore — Suit No. 771 of 1962]

Shipping — Bill of lading — Seaworthiness — Damage to cargo — Badly damaged starboard scupper pipe metal wastage or latent defect — Exercise of due diligence — Hague Rules, art. III rr. 1 & 2, art. IV — Carriage of Goods by Sea Ordinance (Cap. 173).

Carriage of Goods by Sea — Exercise of due diligence to make ship seaworthy before and at the beginning of the voyage — Hague Rules art. III r. 1 — What is exercise of due diligence — Perfunctory and cursory examination not sufficient — Examination must be such as a reasonably careful skilled man would make.

On December 21, 1961, 7,292 packages of copra cakes, the property of the plaintiffs, were shipped in apparent good order and condition on board the defendants' vessel the *Selat Madura* at Sourabaya under a bill of lading of that date for carriage to New York with transhipment at Singapore. It was provided by the bill of lading that it was to have effect subject to the provisions of the Hague Rules which are contained in the Schedule to the Carriage of Goods by Sea Ordinance (Chapter 173) which shall override any of the terms or exceptions in clause (1) of the bill of lading that may be in conflict or inconsistent therewith. It was conceded at the trial by counsel for the defendants that the Hague Rules applied.

Of the 7,292 packages of copra shipped 3,748 packages were stored at the bottom of No. 3 Hold.

On December 23, two days after the vessel sailed from Sourabaya it was noticed that she had a heavy list to starboard. An investigation to ascertain the cause proved abortive and the vessel continued on her voyage. On the following morning, December 24, it was noticed that water mixed with copra cake was pouring out of the starboard forward main deck at No. 3 Hold. An investigation was made and it was found that a considerable quantity of water had entered the No. 3 Hold and as the cargo came up to the hatch covers it was not possible to trace its sources. The crew had to go over the ship's side on a staging to fit a bolt or hook patch over the exit to the scupper pipe An attempt was made to pump the water out of No. 3 Hold without success. The vessel continued her voyage and arrived at Singapore on the morning of December 25. All of the 3,748 packages at No. 3 Hold were found to be damaged.

After the water had been pumped out and some of the No. 3 Hold cargo had been discharged an inspection was made and it was discovered that the two scupper pipes which passed through No. 3 Hold were holed. The starboard scupper pipe had a hole 6" x 1½" while the port scupper pipe had a hole 1" x ¾" and water had entered through these holes. An examination of the scupper pipes revealed that they were badly wasted by rust from lack of maintenance.

Held: (1) the evidence clearly established and it was never seriously disputed that the vessel was unseaworthy before and at the beginning of the voyage. The condition of the starboard scupper pipe in No. 3 Hold was such that no prudent owner would have sent the vessel to sea without requiring the defect to be made good had he known of it;

(2) the defendants had not discharged the burden of proving that they had exercised due diligence to make the vessel seaworthy before and at the beginning of the voyage. The scupper pipe badly damaged as it was through rust and corrosion and in its badly weakened and wasted condition was discoverable on a careful and proper examination by a reasonably careful and skilled man. A perfunctory and cursory examination is not exercise of due diligence;

(3) a latent defect is a defect which could not be discovered on such an examination as a reasonably careful skilled man would make.

[Editorial Note: We are grateful to Mr. M. Karthigesu for bringing this case to our notice.]

Cases referred to:—

(1) *Brown* v. *Nitrate S.S. Co.* (1937), 58 Ll.L.R. 188 at p. 191.

(2) *Riverstone Meat Co. Pty. Ltd* v. *Lancashire Shipping Co. Ltd.* [1961] A.C. 807; [1961] 2 W.L.R. 269; [1961] 1 Lloyd's Rep. 57.

CIVIL SUIT.

M. Karthigesu for the plaintiffs.

C.H. Smith for the defendants.

Cur. Adv. Vult.

Buttrose J.: This is an action for damages for breach of contract and, or in the alternative,